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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1299

THE STANDARD OIL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 276–298) is reported at 63 F. Supp. 48, and the opinion of the Circuit Court of Appeals (R. 318–325) is reported at 158 F. 2d 126.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 5, 1946 (R. 317). An application for rehearing (R. 327–342) was denied on February 3, 1947 (R. 343). The petition for a writ of certiorari was filed on April 28, 1947. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the claim for refund of excise taxes and interest filed by the petitioner, in which two of its subsidiaries joined, met the requirements of Section 621 (d) of the Revenue Act of 1932 and Article 84 of Treasury Regulations 44 (1934 ed.), and was thus sufficient to support a suit for refund under Section 3226 of the Revised Statutes.

STATUTE AND REGULATIONS INVOLVED

The applicable statutes and regulations are printed in the Appendix, *infra*, pp. 16–18.

STATEMENT

The facts found by the District Court (R. 298–307) and as shown by the stipulation (R. 36–62) and the exhibits attached to the complaint (R. 13–27), so far as material here, may be summarized as follows:

The Standard Oil Company (hereinafter referred to as "Standard") is an Ohio corporation engaged in the business of refining crude petroleum, manufacturing lubricating oils and other petroleum products, and distributing the oils and products at wholesale and retail (R. 298–299). It was a manufacturer or producer of gasoline and lubricating oils within the meaning of Section 601 (c) (1) and Section 617 (a) of the

Revenue Act of 1932 as originally enacted and as amended by Section 211 (a) of the National Industrial Recovery Act, which imposed excise taxes upon the sale of these products by manufacturers or producers (R. 299–300).[1]

Caldwell & Taylor Corporation (hereinafter referred to as "Caldwell") was an Ohio corporation organized in 1929 by Standard and one A. B. Caldwell to acquire the assets of four predecessor companies and to engage in the distribution of gasoline, lubricating oils, and other petroleum products by tank wagon and retail service stations. It was not a manufacturer or producer of gasoline and oil; it purchased all of the products sold by it. In June, 1932, Standard owned all of Caldwell's voting common stock and all ($733,000 par value) of its Series B non-voting preferred stock. A. B. Caldwell owned all ($147,000 face amount) of its Series A non-voting preferred shares. (R. 300.) During 1932, Caldwell purchased most of its gasoline from Standard and most of its lubricating oils from other suppliers. It resold these products under its own trade names through its own facilities to

[1] Effective June 21, 1932, the tax on the sale of oil was four cents a gallon and on the sale of gasoline was one cent a gallon. Sections 601 (c) (1), 617 (a) and 629 of the Revenue Act of 1932 (Appendix, *infra*, pp. 16, 17). Effective June 17, 1933, the tax on the sale of gasoline was increased to 1½ cents a gallon. Section 211 (a) of the National Industrial Recovery Act. Appendix, *infra*, p. 17.

its own customers in competition with Standard. (R. 301.)

On June 17, 1932, Caldwell leased certain gasoline storage tanks from Standard and from another of its subsidiary companies and, on June 20, 1932, it purchased from Standard 2,671,735 gallons of gasoline then contained in the previously leased storage tanks. Caldwell paid for the gasoline by checks drawn on its own account within a relatively short period thereafter. This quantity of gasoline represented forty-five to fifty days' normal requirements of Caldwell. Caldwell sold the gasoline on and after June 21, 1932, in the regular course of its business under its own trade names to its own customers. (R. 301–302, 304.) Caldwell was liquidated as of October 31, 1932 (R. 300).

Fleet-Wing Corporation (hereinafter referred to as "Fleet-Wing"), in June 1932 and June 1933, was a wholly owned subsidiary of Standard, engaged in the sale and distribution of gasoline and motor oils to jobbers. It had been organized in 1928 to acquire a predecessor's business and assets. It was not a manfacturer or producer of gasoline and lubricating oils, and in 1932 and 1933, it purchased most of its gasoline from Standard and most of its oils from other suppliers. It resold them under its own trade names to its own jobber customers. (R. 301.)

On June 20, 1932, Fleet-Wing leased gasoline

and oil storage tanks from Standard and from one of its subsidiary companies and, on the same day, purchased from Standard 5,932,687 gallons of gasoline and 122,036 gallons of lubricating oil contained in the leased tanks. It paid for these purchases by checks on its own account during September, October, and November 1932. (R. 302.) The gasoline so purchased represented a forty-five days' normal requirement (R. 305).

On June 12, 1933, Fleet-Wing leased gasoline storage tanks from Standard and from one of its subsidiary companies and on the same day purchased 3,933,779 gallons of gasoline contained in the leased tanks. The purchase price was paid on October 31, 1933, by the transfer of Fleet-Wing's assets to Standard in liquidation. (R. 302.) The gasoline so purchased was less than a thirty days' normal requirement (R. 305).

After these sales to Caldwell and Fleet-Wing, Standard had ample inventories to supply its own customers in the ordinary course of business. (R. 303.)

At the time of the purchases by Caldwell and Fleet-Wing on June 20, 1932, their non-producing competitors were purchasing large quantities of gasoline in anticipation of an increase in cost following the effective date (June 21, 1932) of the new excise tax on sales of gasoline and lubricating oils by producers. Caldwell purchased the gasoline from Standard on June 20, 1932, to ob-

tain an extra supply of gasoline at the lower cost then prevailing to enable it to meet competitive conditions which its president anticipated would exist following the incidence of the tax. (R. 303–304.) Fleet-Wing purchased oil and gasoline from the taxpayer on June 20, 1932, and on June 12, 1933,[2] for the same reasons (R. 305).

After investigation and audit, the Commissioner determined that Caldwell and Fleet-Wing were mere instrumentalities of their parent corporation, Standard, in selling after the excise tax became effective the gasoline and lubricating oil transferred to them just prior to the effective dates of the tax,[3] and hence that the sales were subject to tax (See R. 24–26). Accordingly, he assessed excise taxes and interest thereon in respect of these sales jointly against Standard and Caldwell and jointly against Standard and Fleet-Wing (R. 13, 27, 59–60). On various dates in 1937, Standard paid the taxes so assessed to the Collector of Internal Revenue for the Eighteenth District of Ohio (R. 61, 299). On May 20, 1939, it filed with the Collector a claim for

[2] As previously noted, the tax on gasoline increased one-half cent a gallon effective on June 17, 1933. Section 211 (a), National Industrial Recovery Act.

[3] His determination was based in part on evidence that the storage tanks containing the gasoline and oil were leased by the subsidiaries for a rental charge of $1 per year per tank, and that the recited consideration for each one of the "sales" by Standard to Caldwell and Fleet-Wing was $10 for the entire gallonage transferred (R. 25).

refund of excise taxes and interest paid in the amount of $158,120.51, plus interest (R. 15–22, 23, 61–62). Caldwell and Fleet-Wing joined in the claim and consented to the payment of any amount refunded to Standard (R. 22).

By letter dated February 17, 1940, the Commissioner rejected the claim in full (R. 24–26, 62). The grounds for rejection were that the claim could not be allowed on the merits in view of the information developed in the previous investigation in 1936 which resulted in assessment of the taxes (R. 24–26) and also that the Commissioner was prohibited by Section 621 (d) of the Revenue Act of 1932 from allowing any refund because the taxpayer had failed to comply with its terms (R. 26).

Suit was then instituted by Standard in the District Court to recover the amount of $158,-120.51, plus interest (R. 299). Before trial, the United States filed a motion to dismiss the suit on the ground that the court had no jurisdiction because Standard's claim for refund was insufficient for failure to comply with Section 621 (d) of the Revenue Act of 1932 (R. 31, 277–278). The United States also asserted as a defense in its answer the insufficiency of the claim as a basis for the action (R. 35). The District Court overruled the motion to dismiss, holding that the allegations of the claim complied fully with Section 621 (d) and with Article 84 of Treasury Regulations 44,

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and that in any case the United States had waived any defect in the claim, if one existed (R. 278–282).

On the merits, the District Court concluded that the sales by Standard to Caldwell on June 20, 1932, and to Fleet-Wing on June 20, 1932, and June 12, 1933, were at reasonable prices and were valid and *bona fide* sales, fully consummated on those dates (R. 305–306); that at the time of the sales neither Caldwell nor Fleet-Wing was being operated as a branch, agency, or instrumentality of Standard (R. 304, 305); that the subsequent resales by Caldwell and Fleet-Wing of the products so purchased were not in fact or in law sales made by Standard (R. 306); and that Standard was not liable for excise tax upon the sales (R. 306).

The Circuit Court of Appeals reversed, Judge Miller dissenting, for the reason that the claim for refund did not comply with the requirements of Section 621 (d) of the Revenue Act of 1932 and Article 84 of Treasury Regulations 44, and that it was not sufficient to furnish a basis for suit in the District Court (R. 318–325).

ARGUMENT

The decision of the Circuit Court of Appeals is correct and is not in conflict with any decision. It is required by Section 3226 of the Revised Statutes (Appendix, *infra*, pp. 17–18) and is in accord with well-established principles that a court has no jurisdiction to entertain a suit for refund of a

tax unless there has been filed a claim for refund which complies literally with all the requirements, including those formal in nature only, set out in the statute authorizing refund and the administrative regulation issued thereunder. *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293; *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269; *Tucker* v. *Alexander,* 275 U. S. 228; *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141. See also *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73; *United States* v. *Factors & Finance Co.,* 288 U. S. 89.

Section 621 (d) of the Revenue Act of 1932 expressly conditions the right to refund of the excise taxes involved here, even pursuant to court decision, upon the establishment in the way prescribed by the regulations of certain specific facts. Article 84 of Treasury Regulations 44 (1934 ed.) requires, *inter alia,* that the statutory facts be established by the filing with the refund claim of a sworn statement by the taxpayer. The sworn statement filed by Standard with the claim for refund in this case, in which Caldwell and Fleet-Wing joined (R. 18–22), fails to comply with these specifications, as the Circuit Court of Appeals correctly held (R. 322). No facts are stated which even tend to show that Caldwell and Fleet-Wing, which had been jointly assessed for the tax and which joined in the claim, did not include the

tax in the prices of gasoline and oil collected by them and did not collect the tax from the vendees.[4] Nor is there any precise statement that Standard itself did not do so. The most that can be said is that it might be inferred from the statement that Standard did not collect the tax from Caldwell and Fleet-Wing, but even if this inference were made, it entirely fails to establish that Standard was not unjustly enriched by collecting the tax through its subsidiaries from others. Furthermore, the statement does not show that the tax had been repaid by any one of the claimants to the ultimate purchasers, nor were there attached the written consents of such purchasers to allowance of the refund. The written consent of Caldwell and Fleet-Wing to payment of any refund to Standard (R. 22) did not comply with the regulation since the subsidiaries merely resold the gasoline and oil in the form in which it was transferred to them and hence they were not ultimate purchasers as defined in the regulation. Cf. *Feitler* v. *Harrison,* 126 F. 2d 449 (C. C. A. 7th). These omissions are fatal to the right to refund. Section 3226 of the Revised Statutes; cf. *Angelus Milling Co.* v. *Com-*

[4] The Government offered evidence as to the resale prices of Fleet-Wing and Caldwell of the gasoline and oil here in question, but the District Court excluded it as immaterial (R. 309). The Government assigned error in the Circuit Court of Appeals with respect to exclusion of this evidence but it was unnecessary for the court to decide this point, although it referred to the matter (R. 322).

missioner, 325 U. S. 293; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386; *Vica Co.* v. *Commissioner,* 159 F. 2d 148 (C. C. A. 9th), pending on petition for writ of certiorari, No. 1260, this Term. *Samara* v. *United States,* 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686, relied on by the District Court (R. 282), is not contrary for the reasons pointed out by the Circuit Court of Appeals (R. 324).

As the court below held, no facts were shown to prove that the Commissioner waived the defects in the claim (R. 323–324). On the contrary, the Commissioner expressly rejected the claim on the ground that it was insufficient to meet the statutory requirements (R. 26). While he also rejected it on the merits, he did not do so as a result of an independent investigation of the claim on the merits, but on the basis of evidence already in his files from an investigation antedating the claim which had resulted in assessment of the tax in the first instance (R. 24–26). In these circumstances, there was clearly no waiver. Cf. *Angelus Milling Co.* v. *Commissioner, supra.* Indeed, Standard does not contend in its petition in this Court that the facts here show a waiver.[5]

Standard does contend (Pet. 8–9) that it alone was the taxpayer and that as to it the claim con-

[5] The letter of rejection put Standard on notice that an essential element of its case was lacking, i. e., the filing of a good claim, even though the letter did not explicitly refer to the regulations but only to Section 621 (d). On the date of

tains all essential statements. As already shown, the allegations in the claim with respect to Standard alone are insufficient. Furthermore, the contention ignores the facts that the subsidiaries were jointly assessed for the tax with Standard and that they made themselves parties to the claim for refund. Standard's election to pay the tax discharged the assessments against its subsidiaries as well as itself, and even if the subsidiaries had not joined in the claim, the view of the court below seems correct that by virtue of the payment of the assessed taxes on their behalf they were taxpayers in the sense that they must comply with the conditions precedent for refund. Any other rule would sanction evasion of the real purpose of the statutory requirements. In any case, there would seem to be no doubt that a party to a claim for refund is not excused from complying precisely with the conditions precedent to the right to refund through attributing a literal meaning to the term "taxpayer."* Cf. *L. T. Piver, Inc.* v. *Hoey,* 101 F. 2d 68 (C. C. A. 2d).

The previous discussion shows that there is no basis for Standard's belief (Pet. 9–12) that the Circuit Court of Appeals could only have

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rejection (February 17, 1940) Standard was not barred from filing a new claim. Section 3313 of the Internal Revenue Code allows four years for filing claims for refund of excise taxes after the taxes are paid. The taxes here were paid in May, June, and September of 1937 (R. 299).

* Section 621 (d) uses the term "person who paid the tax," but the regulation refers to the "taxpayer."

reached the result which it did by disregarding the separate entities of Standard and the two subsidiaries. Indeed, the court expressly made the assumption (see R. 322) that the transactions between Standard and its subsidiaries were *bona fide* transactions between independent corporations.

Samson Tire & Rubber Corp. v. *Rogan*, 136 F. 2d 345 (C. C. A. 9th), certiorari denied, 320 U. S. 770, is not in conflict with the decision below, as Standard asserts (Pet. 14–18). In the *Samson* case, the taxes were not assessed against the purchasing corporation nor did it join in the claim for refund. There was there no issue whatever as to the jurisdictional sufficiency of the claim for refund and patently no decision as to sufficiency of a claim in the circumstances of this case.[7] Furthermore, since the Circuit Court of Appeals here did not disregard the corporate identity of the two subsidiaries, it is unnecessary to consider to what extent the *Samson* case (as well as *National Investors Corp.* v. *Hoey*, 144 F. 2d 466 (C. C. A. 2d), and *Page* v. *Haverty*, 129 F. 2d 512 (C. C. A. 5th), also relied on by Standard (Pet. 18–21) on this point)

[7] The *Samson* case is different in another respect from the instant one. The sale immediately prior to the tax was not by a parent corporation to its controlled subsidiary. Both the seller and the purchaser were subsidiaries of other companies which were members of the same interlocking corporate family.

might be in conflict if the court below had made such a holding. It is our position, however, that the factual differences in the instant case would preclude a clear conflict.[8]

Similarly, since the Circuit Court of Appeals predicated its holding solely on the insufficiency

[8] Indeed, it seems that the Circuit Court of Appeals might justifiably have reversed the District Court on the merits in this case. Transactions between a corporation and its sole or controlling stockholder need not be recognized for tax purposes where the only motive is tax avoidance, even though for other purposes the transaction may be valid and fully effective. *Higgins* v. *Smith*, 308 U. S. 473; *Gregory* v. *Helvering*, 293 U. S. 465; cf. *Moline Properties* v. *Commissioner*, 319 U. S. 436; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331. The purpose for the intercorporate transactions here, as found by the District Court (R. 303–304, 305), is in essence nothing more than a tax-avoidance motive phrased in terms of protecting the corporate profits to the extent of the tax. Certainly there was no business purpose independent of the tax-avoidance motive. In similar situations, the great weight of authority supports the view that the parent-producer or manufacturer is for tax purposes the seller of the taxable commodity, effecting the sale by using its controlled subsidiary as a conduit through which to pass title. See *Continental Oil Co.* v. *Jones*, 113 F. 2d 557 (C. C. A. 10th), certiorari denied, 311 U. S. 687; *Mehrlust* v. *Higgins*, 112 F. 2d 717 (C. C. A. 2d), certiorari denied, 311 U. S. 677; *E. Albrecht & Son* v. *Landy*, 114 F. 2d 202 (C. C. A. 8th); *Campana Corp.* v. *Harrison*, 114 F. 2d 400 (C. C. A. 7th); *Black, Starr & Frost-Gorham* v. *United States*, 39 F. Supp. 109 (C. Cls.). *Samson Tire & Rubber Corp.* v. *Rogan*, *supra*, reached a different conclusion, but, as previously noted, there was no purported sale there by a parent corporation to its controlled subsidiary. In *Moline Properties* v. *Commissioner*, 319 U. S. 436, 439, this Court explained the decision in *Continental Oil Co.* v. *Jones*, *supra*, as necessary to strike down a fraud on the tax statute.

of the claim for refund in the particular circumstances of this case, the judgment below does not present the questions of whether Section 621 (d) requires the subsidiaries of a parent-taxpayer generally to establish that they did not shift the tax burden to their ultimate purchasers or of whether the judgment below conflicts, in its result, with the intent of Congress (See Pet. 22–23). It may be pointed out, however, that while Congress did not enact a specific provision making all gasoline transferred to affiliated sales companies just prior to the excise tax subject thereto (see R. 296), this does not negative the intention that the courts shall give effect to substance and hold that products transferred to an affiliate are liable to the tax when sold, if the previous transfer had no business purpose unconnected with tax avoidance.* See cases cited in footnote 8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1947.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 601. EXCISE TAXES ON CERTAIN ARTICLES.

* * * * *

(c) There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer, or imported into the United States, a tax at the rates hereinafter set forth, to be paid by the manufacturer, producer, or importer:

(1) Lubricating oils, 4 cents a gallon; but the tax on the articles described in this paragraph shall not apply with respect to the importation of such articles.

* * * * *

SEC. 617. TAX ON GASOLINE.

(a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

* * * * *

SEC. 621. CREDITS AND REFUNDS.

* * * * *

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from

the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

SEC. 629. EFFECTIVE DATE.

This title shall take effect on the fifteenth day after the date of the enactment of this Act, except that section 628, relating to rules and regulations, and this section, shall take effect on the date of the enactment of this Act. * * *

National Industrial Recovery Act, c. 90, 48 Stat. 195:

Section 211. (a) Effective as of the day following the date of the enactment of this Act, section 617 (a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1½ cents."

* * * * *

Revised Statutes:

SEC. 3226 [as amended by Section 1103, Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 807, Revenue Act of 1936, c. 690, 49 Stat. 1648]. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of

the Treasury established in pursuance thereof; * * *

Treasury Regulations 44 (1934 edition):

ART. 84. *Credits and refunds.*—

* * * * *

In all cases where a person overpays tax, no credit or refund shall be allowed (except as provided in the preceding paragraph), whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the commodity with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he was either repaid the amount of tax to the ultimate purchaser of the commodity or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. For the purpose of the tax the "ultimate purchaser" is a person who purchases an article (1) for consumption, or (2) for use in the manufacture of other articles and not for resale in the form in which purchased. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *

Article 52 of Treasury Regulations 44 (1932 ed.) is substantially the same.

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